BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARK BLICKENSTAFF	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,000,944
PONCA PRODUCTS, INC.	)	
Respondent	)	
AND	)	
	)	
FREMONT INSURANCE COMPANY	)	
c/o WESTERN GUARANTEE FUND	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the May 22, 2003 Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on November 21, 2003, in Wichita, Kansas.

APPEARANCES

Phillip B. Slape of Wichita, Kansas, appeared for claimant. Douglas C. Hobbs of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Additionally, the record includes the parties' Stipulation to Average Weekly Wage, which was filed with the Division of Workers Compensation on December 12, 2002.

ISSUES

Claimant contends he injured his neck and back while working for respondent due to the lifting and welding he performed each and every workday through his last day of work for respondent on June 28, 2001.

In the May 22, 2003 Award, Judge Barnes concluded claimant sustained a 53 percent task loss and a 55 percent wage loss for a 54 percent permanent partial general

disability. When determining claimant's task loss, the Judge averaged the 73 percent task loss opinion provided by claimant's medical expert Dr. Pedro A. Murati with the 33 percent task loss opinion provided by respondent's medical expert Dr. Chris D. Fevurly. When considering claimant's wage loss, the Judge found claimant had failed to make a good faith effort to find other employment after recovering from his accident and, therefore, the Judge imputed a post-injury wage of $280 per week.

Respondent and its insurance carrier contend Judge Barnes erred. Respondent and its insurance carrier argue claimant's work activities neither permanently injured nor permanently aggravated the degenerative condition in his neck and back and, therefore, claimant's request for permanent partial general disability benefits should be denied. In the alternative, they argue the Board should impute a post-injury wage, find a wage loss of 27 to 36 percent and find a task loss of 33 percent for a 30 to 35 percent permanent partial general disability.

Conversely, claimant argues the evidence proves his work activities further injured his back and, therefore, he is entitled to receive permanent partial general disability benefits. Moreover, claimant contends he made a good faith effort to find other employment when respondent would not permit him to return to work and, therefore, he argues for a 100 percent wage loss. In the alternative, claimant contends he retains the ability to earn $280 per week, which creates a 49 percent wage loss through December 1, 2001 (when his fringe benefits were terminated), followed by a 55 percent wage loss.

The only issues before the Board on this appeal are:

1. Did the work that claimant performed for respondent through his last day of work on June 28, 2001, either permanently injure or permanently aggravate his back?

2. If so, what is the nature and extent of claimant's injury and disability?

3. Were temporary total disability benefits paid at the proper rate?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

1. Did the work that claimant performed for respondent through his last day of work on June 28, 2001, either permanently injure or permanently aggravate claimant's back?

Respondent makes commercial and residential awnings. From 1998[1] through June 28, 2001, respondent employed claimant to make and install its awnings. Claimant made frames by cutting and welding aluminum, covered the frames with fabric, and took the awnings to the work sites where he installed the finished product. While performing that work, claimant experienced progressively worsening pain in his low back and cervical spine.

Claimant had low back problems before commencing work for respondent. In the early 1990s, claimant injured his low back at work and was diagnosed as having bulging discs between the first and second and the fourth and fifth lumbar vertebrae. Claimant, who worked as a construction laborer and a concrete finisher at the time, missed approximately one year of work due to that low back injury.

According to claimant, he was not given a functional impairment rating following the earlier low back injury and he was not given permanent medical restrictions. Claimant did not undergo surgery for that back injury. Claimant, however, acknowledged that following the earlier injury he was unable to perform the work of a cement finisher or laborer. Claimant then moved to Kansas and in either May 1993 or May 1994 began working for the Valley Center, Kansas, school district as a groundskeeper. Claimant worked for the school district until 1998 or 1999 when he began working for respondent.

Although claimant experienced some ongoing low back symptoms while working for the school district, he was able to perform that work without much difficulty. Claimant, however, discovered the work that he began performing for respondent bothered his back. As claimant continued to work for respondent, his low back symptoms progressively worsened and he also began having neck symptoms, which also worsened over time. According to claimant, lifting bothered his low back the most but climbing ladders and installing the awnings bothered his neck the most.

At his November 2002 regular hearing, claimant testified his pain now goes down into his hip, right leg and foot; he feels a popping sensation in his back; and he now experiences pain that shoots up into his neck and down into his arm and fingers. In summary, claimant's symptoms are now worse than before he began working for respondent. When claimant commenced working for respondent, he could perform the work. But at the end of his employment with respondent, he was unable to perform those job duties.

[1] There is evidence in the record that claimant began working for respondent in 1998, but there is also evidence in the record that his employment did not begin until 1999.

When claimant testified in November 2002, he was unemployed despite looking for work.

The record contains several medical opinions regarding whether claimant's work activities either permanently injured or permanently aggravated his back. Dr. Robert L. Eyster, an orthopedic surgeon who treated claimant from July 12 through November 7, 2001, testified that claimant had degenerative disc disease, which is a chronic condition that is easily aggravated and which will wax and wane during his lifetime. According to Dr. Eyster, an MRI showed degenerative changes at approximately four of claimant's cervical discs and degenerative changes and disc bulges in his lumbar spine. In summary, Dr. Eyster attributed claimant's symptoms to the preexisting degenerative disc disease and could not detect any permanent impairment that had resulted from the work that claimant had performed for respondent.

Nevertheless, as long as claimant has symptoms, Dr. Eyster believes the following medical restrictions are appropriate: no lifting over 50 pounds, no repetitive lifting over 20 pounds, no overhead work more than two times per hour, limit welding to no more than two to three hours per day and no repetitive looking up or down. Dr. Eyster recommended those restrictions not only to placate claimant's complaints but also to avoid further aggravation of claimant's condition. Moreover, the doctor would have recommended those medical restrictions had he seen claimant before this latest flare-up that claimant experienced while working for respondent.

Dr. Pedro A. Murati, who in March 2002 examined claimant at his attorney's request, determined claimant sustained additional functional impairment as the result of the work he performed for respondent. Claimant complained to Dr. Murati, a physical medicine physician, of neck pain that occasionally radiated down into the right arm, low back pain that went down into the right buttock and right leg, numbness in the fourth and fifth toes and mid-back pain. The doctor diagnosed myofascial pain syndrome affecting the cervical spine and low back pain secondary to multiple degenerative disc disease with annular tears between the first and second and fourth and fifth lumbar vertebrae.

Dr. Murati concluded claimant should not work above shoulder level; should not lift, carry, push or pull greater than 20 pounds; should limit lifting to no more than 20 pounds occasionally and 10 pounds frequently; should not work more than 24 inches from the body; avoid awkward positions of the neck; alternate sitting, standing, and walking; and use good body mechanics at all times.

Using the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), Dr. Murati concluded claimant sustained an additional 17 percent whole body functional impairment due to the low back injury that claimant sustained while working for respondent but an additional 22 percent whole body functional

impairment when claimant's cervical injury was included. The doctor also concluded that before claimant injured his low back and neck performing work for respondent claimant had a preexisting 10 percent whole body functional impairment due to the low back.

In February 2003, Dr. Chris D. Fevurly, an occupational medicine physician, examined claimant at respondent and its insurance carrier's request. Dr. Fevurly determined claimant had disc desiccation and disc bulging particularly at C4-5 and bony spondylosis from C5 to C7, together with similar findings in the lumbar spine with disc bulging, annular tears and bony changes. The doctor diagnosed non-neurogenic low back pain and mild cervical and thoracic pain symptoms.

Dr. Fevurly concluded claimant sustained a five percent whole body functional impairment according to the AMA *Guides* due to the low back injury that he sustained while working for respondent. The doctor attributed all five percent to that work injury. On the other hand, the doctor concluded the AMA *Guides* rated claimant's neck condition at zero percent. Moreover, because of claimant's inability to tolerate very heavy work, which the doctor mainly attributes to the underlying degenerative disc condition, Dr. Fevurly recommends that claimant be limited to medium to heavy labor, limit lifting to 50 pounds occasionally, limit frequent lifting to 35 pounds, limit repetitive lifting to 25 pounds, alternate sitting and standing, and avoid all prolonged bending or stooping.

Considering claimant's testimony and the opinions of the three medical experts, the Board finds that claimant sustained a five percent whole body functional impairment due to the low back injury that he sustained while working for respondent. Moreover, the Board adopts Dr. Fevurly's opinion that claimant had no preexisting functional impairment according to the AMA *Guides* before sustaining the back injury while working for respondent and that claimant's neck condition did not comprise a functional impairment under the *Guides*.

2. What is the nature and extent of claimant's injury and disability?

As a result of the work that claimant performed for respondent through June 28, 2001, claimant aggravated a preexisting degenerative disc condition in his back and now has a five percent whole body functional impairment. The Board finds and concludes that claimant should now observe the medical restrictions recommended by Dr. Fevurly, as set forth above.

Because claimant has sustained a low back injury, his permanent disability benefits are governed and defined by K.S.A. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not

> covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wages being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[4]

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[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] *Id.* at 320.

The Kansas Court of Appeals in *Watson*[5] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including any expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[6]

As indicated above, when claimant testified in November 2002 he was unemployed despite allegedly contacting four or five potential employers every week. Claimant also testified that he was telling potential employers about work restrictions and limitations before they ever asked and had written those restrictions into his resume.

The Judge concluded claimant failed to prove he made a good faith effort to find appropriate employment and, therefore, imputed a post-injury wage of $280 per week. Noting that claimant included his medical restrictions in his resume and would reveal his physical limitations before a potential employer properly asked, the Board finds no reason to disturb the Judge's finding that claimant failed to prove that he has made a good faith effort to find appropriate work. It is reasonable to conclude that workers with permanent medical restrictions may be handicapped from obtaining employment. Likewise, there are laws restricting employers' inquiries regarding impairments and disabilities. By revealing one's medical restrictions without an employer properly asking further lessens the chances of obtaining employment and, in addition, circumvents the protections provided by law.

According to claimant's labor market expert, Jerry Hardin, claimant retained the ability to earn $280 or $320 per week, despite his injuries On the other hand, respondent and its insurance carrier's vocational expert, Karen Crist Terrill, concluded that claimant retained the ability to earn $10 per hour, or $400 per week. The Board concludes that claimant retains the ability to earn approximately $9 per hour, or $360 per week, which will be imputed for the wage loss prong of the permanent partial general disability formula. Accordingly, comparing $360 to claimant's stipulated pre-injury wage of $550.46 per week creates a 35 percent wage loss for the period up to December 1, 2001.

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[5] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[6] *Id.* at Syl. ¶ 4.

On December 1, 2001, respondent quit providing claimant with fringe benefits. The parties stipulated that as of December 1, 2001, claimant's average weekly wage increased to $616.28. Comparing $360 to the stipulated $616.28 per week creates a 42 percent wage loss for the period commencing December 1, 2001.

Under these facts, the Board is persuaded by Dr. Fevurly's opinions regarding the permanent work restrictions and limitations that claimant should now observe. Accordingly, the Board adopts Dr. Fevurly's opinion that claimant has lost the ability to perform 12 of the 36 work tasks that he performed in the 15-year period before injuring his low back while working for respondent. Adjusting Dr. Fevurly's opinion by removing the six duplicate job tasks identified by Mr. Hardin, the Board concludes claimant has lost the ability to perform 10 of his 30 former job tasks, or 33 percent.

The permanent partial general disability formula requires an average of the wage loss and task loss percentages. Accordingly, claimant's permanent partial general disability before December 1, 2001, is 34 percent. Commencing December 1, 2001, however, claimant's permanent partial general disability is 38 percent.

3. Were temporary total disability benefits paid at the proper rate?

The parties stipulated claimant was paid temporary total disability benefits at the equivalent of $344.34 per week. But based upon the parties' wage stipulation, claimant's average weekly wage was $550.46 for the period that he was entitled to receive those benefits. Consequently, the appropriate rate for those benefits was $366.99, which is the figure that will be used in the computation below.

AWARD

WHEREFORE, the Board modifies the May 22, 2003 Award and reduces claimant's permanent partial general disability to 34 percent for the period up to December 1, 2001, followed by a 38 percent permanent partial general disability.

Mark Blickenstaff is granted compensation from Ponca Products, Inc., and its insurance carrier for a June 28, 2001 accident and resulting disability. Based upon an average weekly wage of $550.46, Mr. Blickenstaff is entitled to receive nine weeks of temporary total disability benefits at $366.99 per week, or $3,302.91.

For the period ending November 30, 2001, based upon an average weekly wage of $550.46, Mr. Blickenstaff is entitled to receive 13.14 weeks of permanent partial general disability benefits at $366.99 per week, or $4,822.25, for a 34 percent permanent partial general disability.

For the period commencing December 1, 2001, based upon an average weekly wage of $616.28, Mr. Blickenstaff is entitled to receive 144.56 weeks of permanent partial general disability benefits at $401 per week, or $57,968.56, for a 38 percent permanent partial general disability and a total award of $66,093.72.

As of December 1, 2003, Mr. Blickenstaff is entitled to receive nine weeks of temporary total disability compensation at $366.99 per week in the sum of $3,302.91, plus 13.14 weeks of permanent partial general disability compensation at $366.99 per week in the sum of $4,822.25, plus 104.43 weeks of permanent partial general disability compensation at $401 per week in the sum of $41,876.43, for a total due and owing of $50,001.59, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $16,092.13 shall be paid at $401 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Phillip B. Slape, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director